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No. 80-379

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN ROBERT JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
PHILIP B. HEYMANN
Assistant Attorney General
DAVID B. SMITH
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the procedure followed by the trial court in admitting extrajudicial co-conspirator statements constituted reversible error.

2. Whether petitioner's right to counsel was violated by the admission of incriminatory statements he made to a jailhouse acquaintance after he had been indicted.

3. Whether the admission of tape recordings of narcotics transactions, the use of government-prepared transcripts by the jury, and references by several government witnesses to "Stampede's organization" denied petitioner due process of law.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 627 F.2d 293.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1980. Petitioner's petition for rehearing was denied on March 27, 1980. The government's petition for rehearing was denied on July 11, 1980, at which time the court of appeals issued an order amending its opinion. The petition for a writ of certiorari was filed on September 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of conspiracy, in violation of 21 U.S.C. 846, and numerous substantive offenses involving distribution of or possession with intent to distribute narcotics, in violation of 21 U.S.C. 841(a) and 18 U.S.C. 2 (Pet. App. 4a, 34a-36a).[1] Petitioner was sentenced to a total of 30 to 90 years' imprisonment and a fine of $150,000. The court of appeals affirmed (Pet. App. 1a-40a).

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[1]The jury acquitted petitioner on a count charging him with conducting a criminal enterprise, in violation of 21 U.S.C. 848, as well as on three counts charging violations of 21 U.S.C. 841(a) (Pet. App. 4a n.2, 34a-36a). Co-defendants John R. Slade, Odell Johnson, Jr., Arthur Watson, George N. Marshall and David Redd were all convicted of participation in the same narcotics conspiracy, and all but Arthur Watson were also convicted on one or more substantive counts. Co-defendant Mary Ann Jones was acquitted on all counts.

The government's evidence detailed 21 separate heroin sales from April to October, 1977, to government agents by members of a heroin distribution ring under the management of petitioner and his brother, Odell Johnson, Jr. The so-called "Stampede organization," named after petitioner's alias, "Stampede" Johnson, operated in the neighborhood of 7th and T Streets, N.W., Washington, D.C., and grossed an estimated $2,400 an hour on some occasions (Tr. 262, 771).

The government's four chief witnesses were detective Anthony Patterson, DEA agent Donnie Smith, and two paid informants, Allen Whaley and Charles Ward. All four witnesses testified concerning narcotics purchases they had made through petitioner, many of which were recorded on audio and video tape (Pet. App. 6a–10a). The informants' purchases were closely monitored. Smith or Patterson searched the informants before each transaction, gave them money to purchase the drugs, and usually accompanied them to 7th and T Streets to watch the transactions take place. A DEA chemist analyzed the contraband and in each case found it to contain heroin (Tr. 1222-1230, 1236-1253).

Other members of the Metropolitan Police Department corroborated the informants' testimony and also testified concerning drug seizures from various locations, connecting the seized drugs with particular defendants (Pet. App. 11a). A final prosecution witness, Thurston Shrader, became acquainted with petitioner in jail about a month before the trial began and kept a journal of his conversations with him (Tr. 1353-1358). He testified as to various admissions and inculpatory

statements petitioner made to him, which supported the charges in the indictment (Pet. App. 11a; Tr. 1359–1363). Petitioner and most of his co-defendants did not testify or offer any evidence in their defense.

ARGUMENT

1. Petitioner's first objection relates to the manner in which the jury was instructed with regard to consideration of co-conspirator declarations. Petitioner asserts (Pet. 8–11) that the trial court committed reversible error in instructing the jury as follows with regard to the evidence that it could consider in determining a particular defendant's membership in the alleged conspiracy (Pet. App. 25a; emphasis added):

> Now, as to participation in the conspiracy. Once satisfied that the conspiracy charge[d] existed, you must ask yourself who its members were. In deciding whether a defendant on trial before you was a member of the conspiracy, *you should consider whether on all the evidence*, that defendant knowingly entered the conspiracy and was a willing participant.

In response to petitioner's challenge to the instructions, the court of appeals first noted (Pet. App. 39a) that, since the 1976 revision of the Federal Rules of Evidence, "most of the circuits have expressly held that the judge, not the jury, is to determine the admissibility of alleged co-conspirator statements,"[2] and

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[2] *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Andrews*, 585 F.2d 961 (10th Cir. 1978); *United States* v. *Santiago*, 582 F.2d 1128, 1133 (7th Cir. 1978); *United States* v. *Bell*, 573 F.2d 1040, 1043–1045 (8th Cir. 1978); *United States* v. *Martorano*, 557 F.2d 1, 11–12 (1st Cir.), aff'd on rehearing, 561 F.2d 406

that it had recently joined this trend in its decisions in *United States* v. *Gantt*, 617 F.2d 831 (1980) and *United States* v. *Jackson*, No. 78-1768 (D.C. Cir. Dec. 28, 1979). Petitioner's assertion (Pet. 10-11) that admissibility of the evidence was for the jury to determine is therefore without merit, and he cites no appellate decision supporting his position that conflicts with the decision below on this point.

The court also concluded that implicit in these decisions is that "where the trial judge has made the required preliminary determinations, and decided that the hearsay statements are admissible, he may charge the jury to consider the defendant's substantive guilt based upon 'all the evidence' presented" (Pet. App. 40a). Here, the court stated (*ibid.*) that it was "disturbed" by the trial judge's use of the "all the evidence" instruction because there was "no indication that he made the requisite preliminary determinations of admissibility."[3] Despite this, the court determined that petitioner suffered no prejudice, and it therefore declined to overturn his conviction (Pet. App. 28a). The court found the evidence of guilt "overwhelming" and also noted that co-conspirator statements were "not a significant part of the prosecution's case" (*ibid.*). Indeed, as the court noted (*ibid.*), only

(1977), cert. denied, 435 U.S. 922 (1978); *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978); *United States* v. *Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *United States* v. *Trowery*, 542 F.2d 623, 626-627 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977).

[3]The Second Circuit has held that the making of such a preliminary determination of admissibility may be inferred where the trial judge denied the defendant's motion for a directed verdict of acquittal. *United States* v. *Ziegler*, 583 F.2d 77, 80 n.5 (2d Cir. 1978) (collecting Second Circuit cases).

petitioner's two co-defendants, Watson and Marshall, pointed to any potentially damaging co-conspirator hearsay statements. In these circumstances, petitioner's claim of reversible error is without merit.

2. Petitioner next contends (Pet. 5-6, 11-13) that the admission of incriminating statements he made to a jail acquaintance, Thurston Shrader, after he had been indicted, violated his Sixth Amendment right to counsel. However, petitioner concedes (Pet. 5) that he did not object to the admission of Shrader's testimony at trial on this ground and that he also failed to raise this issue in the court of appeals. He therefore appears to have waived this claim, and, in any event, it is not now properly presented for review. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's claim is without merit on the record presented. Petitioner asserts that Shrader's role was similar to that of Nichols, the paid government informant in *United States* v. *Henry*, No. 79-121 (June 16, 1980). However, Shrader's role was more analogous to that of Henry's other cellmate, Sadler, who informed government agents of Henry's incriminating admissions on the advice of counsel. Because Sadler was not a paid government informant and had no prior arrangement with the government to monitor or report on conversations with Henry, there was no question regarding the admissibility of his testimony. See *United States* v. *Henry*, *supra*, slip op. 3 n.3. Shrader's role in the present case was similar. As the court below stated (Pet. App. 11a-12a; footnote omitted):

> Shrader contacted the United States attorney himself, offering assistance in the hopes of mitigating his own three year sentence for misprision of a felony and, presumably, any punishment for pending embezzlement charges. There was no indication that Shrader operated as a "plant" in any contact with the prosecution or the police.

This account is supported by the record (Tr. 1476–1501).

Petitioner points out (Pet. 6) that some of his statements to which Shrader testified were not contained in a written statement Shrader gave to the Assistant United States Attorney at the time of his initial meeting with the Assistant on January 6, 1978; that Shrader did not turn over to the government the book containing his notes of petitioner's statements until January 11; and that Shrader had some conversations with petitioner between January 6 and January 11. From these observations, petitioner would have us infer that some of petitioner's statements to which Shrader testified occurred *after* Shrader's January 6 meeting with the Assistant United States Attorney and therefore after the point at which Shrader arguably became a government informant. However, although the record shows that the substance of certain portions of Shrader's testimony was not also included in his written statement of January 6, this does not in itself demonstrate that Shrader overheard those particular statements after the January 6 meeting. Moreover, in response to a question by petitioner's counsel as to whether he "pumped" petitioner for information after January 6, Shrader testified (Tr. 1499):

> No sir, I did not. And I was heavily warned by the United States Attorney not to do so. And I

> mentioned that in the diary, in the journal itself, that I was admonished that I could not seek any information once I had talked to him, I could not work as an informant or any type of agent on that related case. Actually, the reason for my continued writing was for other related matters.

Thus, Shrader understood that he could not "seek any information" or "work as an informant" after the January 6 meeting.[4] Petitioner has not shown that Shrader's role was different from what he described. Furthermore, to the extent that Shrader obtained petitioner's confidence while the two men were in custody together, this occurred prior to the time that Shrader first contacted authorities and therefore prior to the time that he could be regarded as a government informant. Compare *United States* v. *Henry*, *supra*, slip op. 6–7. In these circumstances, it cannot be said that the government "intentionally creat[ed] a situation likely to induce [~~Shrader~~ Petitioner] to make incriminating statements without the assistance of counsel" (*id.* at 10).[5]

3. Petitioner also argues (Pet. 13–18) that he was denied a fair trial because (a) the trial court admitted

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[4]This would appear not to be a case, then, in which the informant was free, under the instructions given him, to elicit statements in ways less direct than asking questions or initiating conversations with the defendant about the charges against him. Compare *United States* v. *Henry*, *supra*, slip op. 7 n.8.

[5]In any event, in light of the other compelling evidence against petitioner, much of it in the form of audio and visual tapes, any error in the admission of Shrader's testimony as to statements made by petitioner after January 6 (assuming there were any) was harmless. Compare *United States* v. *Henry*, *supra*, slip op. 10–11 n.13; *Milton* v. *Wainwright*, 407 U.S. 371 (1972).

tape recordings of Whaley's and Ward's drug purchases that were partially inaudible; (b) the court allowed the jurors to make use of government-prepared transcripts when listening to the tapes; and (c) the court declined to declare a mistrial when government witnesses made references to "Stampede's organization" or "Stampede's dope." These fact-bound claims are fully addressed by the court of appeals' opinion, upon which we rely (Pet. App. 14a–20a, 22a–25a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

DAVID B. SMITH
Attorney

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